UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA,

PLAINTIFF,

v. CRIMINAL ACTION NO. 2:18-00152

MENIS E. KETCHUM, II,

DEFENDANT.

DEFENDANT'S SENTENCING MEMORANDUM WHICH INCLUDES LEGAL AUTHORITY SUPPORTING DEFENDANT'S SINGLE OBJECTION TO THE PRESENTENCE REPORT AND DEFENDANT'S REQUEST FOR A VARIANCE

Defendant, Menis E. Ketchum, II, submits this sentencing Memorandum with legal authority supporting his single objection to the presentence report and identifies mitigating factors the Court may consider in determining the appropriate sentence.

I.

DEFENDANT'S LEGAL ARGUMENT SUPPORTING HIS OBJECTION THAT THE TOTAL OFFENSE LEVEL IS INCORRECT

THE CORRECT TOTAL OFFENSE LEVEL IS EIGHT RATHER THAN TEN AS CONCLUDED BY THE PRESENTENCE REPORT

The presentence report arrives at the total offense level of ten by the impermissible double counting of the sentencing guideline's "misrepresentation enhancement" and its "abuse of trust enhancement." The double counting was as follows:

Misrepresentation Enhancement

> Paragraph 95 of the presentence report styled, "Specific Offense Characteristics," assigned Menis a +3 enhancement because "the offense involved a misrepresentation that the defendant was acting on behalf of a government agency . . . ." This increase was pursuant to Guideline 2B1.1(6)(9)(A). (Emphasis added).

Abuse of a Position of Trust Enhancement

> Paragraph 97 of the presentence report styled, "Adjustment for Role in the Offense," assigned an additional +2 enhancement because "The defendant abused a position of public trust in a manner that significantly facilitated the commission . . . of the offense." This increase was pursuant to Guideline 3B1.3.

Double counting of enhancements is allowed "unless a guideline provision expressly prohibits consideration of a factor previously used in applying another guideline section." U.S. v. Blake, 81 F.3d 498 (4th Cir. 1996). In Menis' case, there is an express prohibition that prohibits double counting of the enhancements in paragraphs 95 and 97 of the presentence report.

The +2 enhancement assigned in paragraph 97 of the report relating to an abuse of a position of trust may not be used as an enhancement if abuse of trust is included in the specific offense characteristic set out in paragraph 95. Guideline 3B1.3 states, "*This adjustment may not be used if an abuse of trust . . . is included in the base offense level or specific offense characteristic*."

Menis was charged and convicted of making misrepresentations related to personal use of a state car and gas card, *i.e.*, misrepresenting that he was acting on behalf of a government agency when driving a state car and using a state fuel card for personal use from August 6 through 9, 2014 on a personal trip to Virginia (See paragraphs 4, 5 and 6 of the Information). In paragraph 95 of the presentence report, Menis received a +3 enhancement for the misrepresentation that he was acting on behalf of a government agency when driving the car for personal use. Then, in paragraph 97, he received an abuse of trust +2 enhancement pursuant to Guideline 3B1.3 based upon the same misrepresentation that he was acting on behalf of a government agency as contained in paragraph 95, *i.e.*, he abused his position of trust when he misrepresented he was using the state car and fuel card on government business. Therefore, Guideline 3B.1.3 expressly prohibits its use since misrepresentation was applied to assign a +3 enhancement in paragraph 95.

We cannot find a published federal appeals court case directly on point. However, we found an unpublished Fourth Circuit case on point. It is U.S. v. Williams, 25 Fed. Appx. 175, 2002 WL 58160 (4th Cir. 2002) (A copy is attached).

Part C of U.S. v. Williams addresses double counting of a +2 misrepresentation enhancement and a +2 abuse of public trust enhancement when the defendant fraudulently misrepresented that he was acting on behalf of a government agency. The misrepresentation was the base level offense or specific offense characteristic under sentencing Guideline 2F1.1(b)(4). The district judge assigned another +2 enhancement pursuant to sentencing Guideline 3B1.3 for "abuse of a position of public trust."

The Fourth Circuit held that this amounted to double counting of enhancements. It stated that under sentencing Guideline 3B1.3, an adjustment for abuse of trust may not be employed if it

is included in the base level offense. The Fourth Circuit's holding was, "Thus, the [district] court necessarily based both the §2F.1(b)(4) 2-level adjustment (misrepresentation) and the §3B1.3 upward 2-level adjustment (abuse of position of trust) on the same abuse of trust, which resulted in impermissible double-counting in the calculation of William's offense level."

We respectfully submit that the +2 enhancement in paragraph 97 be stricken and the total offense level reduced to eight.

II.

THE DIFFERENCE IN DEGREES OF PUNISHMENT IF THE OFFENSE LEVEL IS LOWERED FROM LEVEL 10, ZONE B TO LEVEL 8, ZONE A

AND

THE NOVEMBER 1, 2018 AMENDMENTS TO SENTENCING GUIDELINE 5C1.1 (IMPOSITION OF A TERM OF IMPRISONMENT) AND SENTENCING GUIDELINE 5F.2 (HOME DETENTION)

Offenses falling within Zones A and B of the Sentencing Table are considered lower level offenses. The presentence report assigns Menis a total offense level of ten which places his offense in Zone B. If the Court finds that the presentence report arrived at level ten by using impermissible double counting of level enhancements, then the total offense level will be dropped to eight and place Menis in Zone A.

Although offenses falling in Zones A and B are low level offenses, there are differences in the types or degrees of punishment allowed under Zone A and B offenses. Zone A has a full spectrum of sentencing options, including a fine only or a term of probation only. Zone B does not allow a fine only, and probation must include in place of imprisonment either home

confinement, intermittent confinement or community confinement (halfway house). *See, United States Sentencing Commission's commentary on text of Amendments to the Sentencing Guidelines, effective November 1, 2018, previously attached, and paragraph 138 of the presentence report.*

We respectfully submit that a term of imprisonment should not be imposed if the court finds that Menis' total offense level is ten, which falls within Zone B. Moreover, we submit that Menis' total offense level should be reduced to level eight, Zone A, and he should be placed on probation only or fined only. (The fine range is $2,000 minimum and $20,000 maximum. See paragraph 151 of the presentence report.)

On November 1, 2018, an amendment to sentencing Guideline 5C1.1 (Imposition of a Term of Imprisonment) became effective. Application Note 4 was added which states when considering Zone A and B offenses, the sentencing judge should consider imposing a sentence other than a sentence of imprisonment. The full text of new Application Note 4 states:

> If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, **the court should consider imposing a sentence other than a sentence of imprisonment**, in accordance with subsection (b) or (c)(3). See 28 U.S.C. § 994(j). For purposes of this application note, a "nonviolent first offender" is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase "comparable judicial dispositions of any kind" includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications. (Boldness added).

This new application note is consistent with the statutory language in 28 U.S.C. § 994(i) regarding the "general appropriateness of imposing a sentence other than imprisonment" for "a first offender who has not been convicted of a crime of violence or an otherwise serious offense,

and cites the statutory provision in support. *United States Sentencing Commission's commentary on text of Amendments to the Sentencing Guidelines, effective November 1, 2018* (A copy is attached).

Guideline 5F1.2 (Home Detention) was also amended. It deleted the language from the commentary to Guideline 5F1.2 which had encouraged courts to use electronic monitoring when home detention is made a condition of probation. The revised language allows probation officers to use surveillance methods that they deem appropriate other than electronic monitoring, e.g., telephone contact, video conference, unannounced home visits. *See United States Sentencing Commission's commentary on text of Amendments to the Sentencing Guidelines, effective November 1, 2018, previously attached.*

III.

A DOWNWARD VARIANCE OF THE SENTENCING GUIDELINES IS REQUESTED

There are two commonly applied grounds used by sentencing judges to impose a sentence that is lower than the advisory sentencing guideline ranges. It is within the judge's discretion whether to use either method to impose a sentence below the guideline ranges. U.S. v. Pauley, 511 F.3d 468 (4th Cir. 2007); Primer, Departures and Variances, prepared by the Office of General Counsel, United States Sentencing Commission, April 2018.

The first method is called a downward departure. Departures are authorized adjustments within the guidelines, to a sentencing guideline range; such as, the downward departure list in U.S.S.G. §§ 5K2.1 and 5K2.20. The guidelines themselves encourage departures. See, U.S. v. Terry, 142 F.3d 702 (4th Cir. 1998).

In paragraph 156 of the presentence report, the probation officer, Jeffrey Gwinn, stated that he found no guideline factors warranting a departure from the sentencing guidelines. In other words, there is nothing in the sentencing guidelines that would warrant a downward departure. We agree.

The second commonly used method by judges are adjustments outside of the sentencing guidelines called variances. This occurs when a judge considers matters outside the sentencing guidelines and are based on an exercise of the court's discretion under 18 U.S.C. § 3553. In some situations, a prohibited ground for guideline departure may be a valid basis for a variance. U.S. v. Chase, 560 F.3d 828 (8th Cir. 2009); Primer, Departures and Variances, *supra*. In U.S. v. Fumo, 655 F.3d 288 (3rd Cir. 2011), the court noted that a district court has more discretion in imposing a variance and that a sentence resulting from a variance is subject only to a substantive reasonableness review, a lower standard than applied to departures.

Downward variances have been approved by the Fourth Circuit Court of Appeals. In U.S. v. Pauley, 511 F.3d 468 (4th Cir. 2001), there was an appeal from the district court in the Southern District of West Virginia, Charleston Division. The district court granted a substantial downward variance and the U.S. Attorney appealed, contending the district court did not offer compelling reasons to justify the substantial downward variance from the advisory sentencing guidelines. The Fourth Circuit affirmed the downward variance. It found the district court had the discretion to go outside the sentencing guidelines and consider factors within 18 U.S.C. § 3553, that an appeals court must give due deference to the district court's decision, and that the district court's downward variance from the sentencing guideline range was reasonable and premised on the factors listed in 18 U.S.C. § 3553.

The U.S. Attorney in Pauley also argued that the sentence must be vacated because the district court placed excessive weight on a single sentencing factor listed in 18 U.S.C. § 3553(a), *i.e.*, the judge gave too much weight to the history and characteristics of the defendant. The Fourth Circuit did not agree with the U.S. Attorney. It held:

> (1) it is quite reasonable for the sentencing court to have attached great weight to a single factor in 18 U.S.C. § 3553(a) and;
>
> (2) an appellate court should not find the sentencing court's reliance on a single factor unreasonable, so long as the court imposes a sentence "sufficient, but not greater than necessary to accomplish the sentencing goals advanced in § 3553. (*Citing* Gall v. U.S., 552 U.S. 38 (2007) and Kimbrough v. U.S., 552 U.S. 85 (2007).

It is important that the court in Pauley allowed the heavy reliance on a single factor because most of the factors in § 3553(a) do not relate to a defendant's personal conduct or characteristics. In support of our request for a downward variance, we rely heavily on one factor in § 3553(a), "the nature and circumstances of the offense and the history and characteristics of the defendant."

Pauley determined that personal characteristics like those of Menis, that were relied upon by the district court, were very important in granting a downward variance. The Fourth Circuit found:

> In its consideration of the § 3553(a) factors, the district court correctly found in the exercise of its discretion that other facts warranted a sentence lower than that recommended by the Guidelines range. The district court found that Pauley warranted a lower sentence because he was deeply remorseful and besides the criminal conduct at issue, he was a good father and teacher. Such considerations were appropriate because they are directly tied to § 3553(a)(1)'s directive that the court consider the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1). The district court also found that Pauley warranted a lower sentence because he lost his teaching certificate and his state pension as a result of his conduct. Consideration of these facts is consistent with § 3553(a)'s directive that the sentence reflect the need for "just punishment," id.

> § 3553(a)(2)(A), and "adequate deterrence." id § 3553(a)(2)(B). The district court further explained that a lower sentence would allow Pauley to be rehabilitated through the counseling he will receive during incarceration, and the court noted that a lifetime of supervised release would reduce the risk of Pauley becoming a repeat offender and would deter him from future criminal conduct. These are also valid considerations under § 3553(a). In sum, considering all of the factors that the district court viewed as mitigating in their totality, we hold that the thirty-six month downward variance was supported by the justifications necessary to uphold the sentence. (Emphasis added).

The relevant history and characteristics of Menis are set out in the presentence report and its attachments. They are:

1. He turned 76 years old on January 31, 2019;

2. He has no criminal history;

3. As a result of his conviction, he has lost his job, lost his state pension, lost his law license and lost his good reputation;

4. He has expressed sincere remorse which is acknowledged in the presentence report;

5. He was very active in community activities and professional service. Paragraph 132 of the presentence report contains a long list of these activities. They are:

    (a) From 2011 until the present: Reporter of West Virginia's Pattern Jury Instructions in civil cases;

    (b) From 1970 to present: Presented numerous publications and gave numerous seminars to West Virginia lawyers and judges;

    (c) From 2010 to 2013: Provided guest lectures in Professor Starcher's class on trial advocacy at the West Virginia University Law School;

    (d) From 2002 until 2009: Served on Board of Governors of Marshall University;

(e) From 2003 until December 2007: Chairman and Vice Chairman of the Marshall University Board of Governors;

(f) From 1994 until 2009: Board of Directors of the Cabell and Wayne County Public Defender Agency for the Sixth and Twenty-Fourth Judicial Circuits;

(g) Unsure of dates through 2006: Taught criminal justice at Marshall University, pro bono;

(h) From 1994 until 1995: Served on Governor's Mine Safety Task Force;

(i) During 1990's: Member of the visiting committee at the West Virginia University Law School;

(j) For four years during the 1980's: Served on Board of Directors of the Huntington Urban Renewal; and

(k) Periodically (dates unknown): Volunteered at the Legal Aid office in Huntington, West Virginia.

6. Prior to his knowledge of the federal investigation, he requested that the Supreme Court issue him amended W-2s regarding the use of the state car and paid the income taxes. After receiving the amended W-2s, he discovered that the state failed to include Two Thousand Four Hundred Seventy-Six Dollars Eighty-Two Cents ($2,476.82) in the amended W-2s, and Menis added that amount to his amended tax returns;

7. He began reimbursing the state for his personal use of the state car before he discovered on February 16, 2017 that there was a federal investigation. He has totally reimbursed the state for the personal use of the car, except for Seven Hundred Forty-Nine Dollars Seventy-Seven Cents ($749.77) that was discovered after he learned of the federal investigation. He did not reimburse this amount on the advice of his lawyer who was having talks with Anna Forbes, Assistant United States Attorney.

We respectfully submit that if the Court determines Menis' total offense level should not be reduced from level ten to level eight because of impermissible double counting that the Court

grant a downward variance, reducing Menis' total offense level to eight. This would place Menis in Zone A of the Guideline's Sentencing Table.

CONCLUSION

It is respectfully submitted that Menis' total offense level should be reduced to level eight in Zone A and that his sentence should be a fine only or probation only, which would be consistent with § 3553(a)'s directive that the sentence reflect the need for "just punishment" and "adequate deterrence." See, U.S. v. Pauley, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing document, "**DEFENDANT'S SENTENCING MEMORANDUM WHICH INCLUDES LEGAL AUTHORITY SUPPORTING DEFENDANT'S SINGLE OBJECTION TO THE PRESENTENCE REPORT AND DEFENDANT'S REQUEST FOR A VARIANCE**," has been electronically filed and service has been made by virtue of such electronic filing on the following counsel of record this 4th day of February, 2019:

Philip Wright
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/s/James M. Cagle
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Counsel for Menis E. Ketchum, II

ATTACHMENT 1

U.S. v. Williams, 25 Fed. Appx. 175, 2002 WL 58160 (4th Cir. 2002)

25 Fed.Appx. 175,
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Michael Donald WILLIAMS, Defendant-Appellant.

No. 00-4897.
|
Argued Dec. 6, 2001.
|
Decided Jan. 16, 2002.

Synopsis
Defendant was convicted pursuant to his plea of guilty in the United States District Court for the Eastern District of North Carolina, Terrence W. Boyle, Chief District Judge, of impersonating federal officer. Defendant appealed his sentence. The Court of Appeals held that: (1) defendant occupied position of trust by representing that he was federal Marshal when in fact he was not; (2) defendant abused position of trust for purposes of application of two-level adjustment under Sentencing Guidelines; (3) court engaged in impermissible double-counting by imposing both misrepresentation enhancement and abuse of trust adjustment; and (4) plain error resulted when defendant received sentence six months longer than longest sentence in proper sentencing range.

Vacated and remanded.

West Headnotes (10)

[1] Criminal Law
⇐ Review De Novo

Questions of law relating to interpretation of the Guidelines are reviewed de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

Cases that cite this headnote

[2] Criminal Law
⇐ Sentencing

Factual determinations of a district court under the Sentencing Guidelines are reviewed for clear error. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

Cases that cite this headnote

[3] Criminal Law
⇐ Necessity of Objections in General

When a defendant fails to raise an issue in the district court, review is for plain error.

Cases that cite this headnote

[4] Sentencing and Punishment
⇐ Abuse of Position of Trust

Defendant occupied position of trust, for purposes of two-level adjustment for abuse of position of trust under Guidelines, by orally representing to victim of his impersonation that he was United States Marshal and by showing her a badge, when in fact he was not a Marshal. U.S.S.G. § 3B1.3, comment. (n. 2), 18 U.S.C.A.

Cases that cite this headnote

[5] Criminal Law
⇐ Scope and Effect of Objection

Defendant sufficiently preserved for review issue of whether he abused position of trust for purposes of two-level adjustment under Sentencing Guidelines by orally objecting at sentencing hearing on ground that Presentence Report incorrectly concluded that he had purported to act on behalf of Government when he advised his victim that he could purchase government-seized luxury car for her. U.S.S.G. § 3B1.3, 18 U.S.C.A.

Cases that cite this headnote

[6] Sentencing and Punishment
⇐ Abuse of Position of Trust

Defendant abused position of trust, for purposes of two-level adjustment under Sentencing Guidelines, in advising his victim that he was federal Marshal, and at same time informing her that he could obtain government-seized luxury car for her in exchange for cash, where, from victim's standpoint, it was defendant's purported government status that permitted him to purchase the vehicle. U.S.S.G. § 3B1.3 et seq., 18 U.S.C.A.

Cases that cite this headnote

[7] Sentencing and Punishment
⇐ Dual or Duplicative Use

Double-counting is allowed under the Sentencing Guidelines unless a provision expressly prohibits consideration of a factor previously used in applying another guideline section. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

Cases that cite this headnote

[8] Sentencing and Punishment
⇐ Adjustments

In sentencing defendant for impersonating a federal officer, court engaged in impermissible double-counting in applying both two-level enhancement under fraud and deceit Guideline for misrepresenting that he was acting on behalf of government agency and two-level adjustment for abuse of trust for single misrepresentation to one person that he was federal Marshall who could obtain government-seized luxury car for her in exchange for cash. U.S.S.G. §§ 3B1.3, 2F1.1(b)(4), 18 U.S.C.A.

1 Cases that cite this headnote

[9] Criminal Law
⇐ Necessity of Objections in General

Reviewing court may notice plain error only if the defendant demonstrates that (1) an error occurred, (2) it was plain, and (3) it was material or affected the defendant's substantial rights; in addition, court will exercise its discretion to correct plain error only when it seriously affects the fairness, integrity or public reputation of judicial proceedings.

Cases that cite this headnote

[10] Criminal Law
⇐ Sentencing and Punishment

Double-counting error, occurring when court imposed both two-level enhancement for misrepresenting that defendant was acting on behalf of government agency under fraud and deceit Guideline and two-level adjustment for abuse of trust, rose to level of plain error where it resulted in sentence of 30 months, which was six months longer than maximum permissible sentence under correct Guidelines sentencing range. U.S.S.G. §§ 3B1.3, 2F1.1, 18 U.S.C.A.

Cases that cite this headnote

*176 Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (CR-99-32).

Attorneys and Law Firms

George Alan DuBois, Assistant Federal Public Defender, Raleigh, North Carolina, for Appellant. Felice McConnell Corpening, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. ON BRIEF: Thomas P. McNamara, Federal Public Defender, Raleigh, North Carolina, for Appellant. John Stuart Bruce, Interim United States Attorney, Anne M. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Before LUTTIG, KING, and GREGORY, Circuit Judges.

OPINION

PER CURIAM.

**1 Michael Donald Williams appeals from his sentence of thirty months of imprisonment imposed in the Eastern District of North Carolina. His conviction and sentence resulted from his guilty plea for a single count of impersonating a federal officer, in violation of 18 U.S.C. § 912. Williams maintains on appeal that the district court, in imposing sentence, committed reversible error when it applied an upward 2-level adjustment for abuse of a position of trust, pursuant to United States Sentencing Commission, *Guidelines Manual* § 3B1.3. (Nov.1998). [1] As explained below, we conclude that this contention has merit, and we vacate and remand.

I.

Williams was charged on March 16, 1999, in a single-count indictment, with violating 18 U.S.C. § 912 by falsely assuming and pretending to be a United States Marshal, [2] and thereby obtaining $700 in *177 United States currency. [3] On July 17, 2000, without any kind of plea agreement or arrangement with the Government, Williams entered a plea of guilty to the indictment. The factual basis for Williams's plea was simple: Williams had exhibited a badge to the victim of his crime, Sherry Ewing; he had falsely advised her he was a United States Marshal; and he had claimed he could obtain a Government-seized Lexus automobile for her. Thereafter, Ewing paid Williams $700 in cash for purchase of the Lexus, and Williams falsely promised to deliver the luxury vehicle to her. Williams, however, failed to deliver the Lexus to Ewing, and he of course kept the money.

A Presentence Investigation Report ("PSR") was completed prior to Williams's sentencing, and the Government made no objections to its contents. Williams, however, filed nine objections to the PSR, including an assertion that he had not represented to Ewing, in connection with his criminal activity, that he was acting on behalf of a Government agency.

At his November 27, 2000, sentencing proceeding conducted in the Eastern District of North Carolina, Williams orally presented two objections to the PSR: (1) he maintained the objection that the PSR incorrectly concluded that he was acting on behalf of the Government when he advised Ewing that he could purchase the Lexus for her, and (2) Williams asserted, for the first time, that the PSR erroneously concluded that he had abused a position of private or public trust. The district court overruled all of Williams's objections, and it proceeded to impose sentence.

In determining the Guideline on which Williams's sentence should be based, the court analyzed the provisions of both USSG §§ 2J1.4 (impersonation) and 2F1.1 (fraud and deceit). The court first looked to § 2J1.4, which fixes the base level offense at 6. [4] This Guideline, however, requires cross-reference to other provisions of the Guidelines, if (1) the impersonation was to facilitate another offense, and (2) application of the cross-referenced Guideline would result in an offense level greater than 6. USSG § 2J1.4. As such, because Williams's impersonation of a federal Marshal facilitated his commission of a fraud, the court cross-referenced § 2F1.1, the Guideline for fraud and deceit. [5] Applying that Guideline, the court calculated an offense level of 10, by: (1) starting with § 2F1.1(a)'s base offense level of 6; (2) adding the 2-level enhancement for more than minimal planning, required by *178 § 2F1.1(b)(2); and (3) adding another 2-level enhancement for misrepresenting that the defendant was acting on behalf of a Government agency, pursuant to § 2F1.1(b)(4).

**2 Because the offense level of 10 calculated under § 2F1.1 was greater than the offense level of 6 arrived at by the application of § 2J1.4, the court, pursuant to § 2J1.4, based Williams's sentence on the Guideline resulting in the higher offense level, i.e., § 2F1.1 (fraud and deceit). The court then added an upward 2-level adjustment for abuse of a position of trust, pursuant to § 3B1.3, [6] and it awarded Williams a downward 2-level adjustment for acceptance of responsibility, as provided for in § 3E1.1. [7] Thus, after the court considered each of these adjustments, it concluded that Williams had an offense level of 10. The court also found that Williams had a criminal history level of VI, and that his appropriate sentencing range was imprisonment for a period between twenty-four and thirty months. The court then sentenced Williams to prison for a period of thirty months.

Williams thereafter filed this appeal, challenging only his sentence. He maintains that it must be vacated and that he is entitled to be resentenced because the court erred in applying the upward 2-level adjustment for abuse of a

position of trust, pursuant to § 3B1.3. More specifically, he asserts that, had his sentence been properly calculated, his maximum term of imprisonment could not have exceeded twenty-four months. We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

[1] [2] [3] We review de novo questions of law relating to interpretation of the Guidelines. *United States v. Montgomery*, 262 F.3d 233, 250 (4th Cir.2001). On the other hand, we review for clear error factual determinations of a district court under the Guidelines. *Id.* at 249-50. When a defendant fails to raise an issue in the district court, our review is for plain error. *United States v. Olano*, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

III.

[4] On appeal, Williams maintains that his sentence should be vacated because the court erred in applying an upward 2-level adjustment for abuse of a position of trust, pursuant to § 3B1.3. Williams supports this contention with the following three points: (1) he did not occupy a position of trust with respect to Ewing; (2) if he held a position of trust with respect to Ewing, he did not abuse that trust when he represented that he could obtain for her the Government-seized Lexus; and (3) the court engaged in impermissible double-counting when it based his sentence on § 2F1.1 (fraud and deceit), and also applied an upward adjustment for abuse of a position of trust, pursuant to § 3B1.3.

A.

First of all, Williams asserts that he did not occupy a position of trust with respect to Ewing because he was not actually a United States Marshal. His contention on this point is devoid of merit. The Commentary to the Guidelines, which we are bound to apply, *see* *179 *Stinson v. United States*, 508 U.S. 36, 42-44, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993), provides that a § 3B1.3 adjustment "applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not." USSG § 3B1.3, comment (n.2). Thus, the critical question is whether the facts show that Williams gave Ewing sufficient indicia that he was a federal Marshal, not whether Williams was actually a federal Marshal.

**3 The district court found as a fact that Williams exhibited a badge to Ewing in connection with his representation that he was a United States Marshal, which, coupled with his oral representations, constituted sufficient indicia that Williams was such an official. Morever, it is well-settled that law enforcement officers occupy positions of public trust. *United States v. Williamson*, 53 F.3d 1500, 1525 (10th Cir.1995); *United States v. Rehal*, 940 F.2d 1, 5 (1st Cir.1991). Thus, the court did not err in concluding that Williams occupied a position of trust vis-a-vis Ewing.

B.

[5] Next, Williams contends that, even if he occupied a position of trust with respect to Ewing, he did not abuse this trust. He maintains that anyone can purchase a Government-seized vehicle, and therefore he was not abusing any position of trust when he advised Ewing he could purchase the Government-seized Lexus for her. Although the Government asserts that Williams did not raise this issue in the district court, we cannot agree. At his sentencing hearing, Williams maintained that the PSR incorrectly concluded that he was acting on behalf of the Government when he advised Ewing that he could purchase the Lexus for her. The court overruled Williams's objection, thus preserving the issue for our review. Moreover, because his contention on this point involves a question of the court's interpretation of the Guidelines, we review it de novo. *United States v. Montgomery*, 262 F.3d 233, 250 (4th Cir.2001).

[6] Section 3B1.3's Commentary provides that "[f]or this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission ... of the offense." USSG § 3B1.3, comment (n.1). In this case, Williams advised Ewing that he was a federal Marshal, and at the same time informed her that he could obtain for her the Lexus vehicle. From Ewing's perspective, it was Williams's status as a federal Marshal that permitted him to purchase the Lexus. Thus, Williams obtained the cash sum of $700 from

Ewing, at least in part, by exploiting the trust she placed in public officials. As such, Williams's criminal activity involved abuse of a position of trust, and the district court did not err in applying the § 3B1.3 2-level upward adjustment on this basis.

C.

[7] Finally, Williams contends that the district court engaged in impermissible double-counting when it based his sentence on § 2F1.1 and then also applied an adjustment for abuse of a position of trust, pursuant to § 3B1.3. We have recognized that "[i]f conduct falls within the applicable definitions [of the Guidelines], then it is appropriate to increase the offense level for each enhancement." *United States v. Curtis*, 934 F.2d 553, 556 (4th Cir.1991). In reaching this conclusion, we determined that the absence of a double-counting prohibition in the Guidelines was by design, because the "Guidelines are explicit when double counting is forbidden." *Id.* Thus, we allow double-counting under the Guidelines "[u]nless a guideline provision expressly prohibits consideration of a factor previously used in applying another guideline section." *United States v. Blake*, 81 F.3d 498, 505 (4th Cir.1996).

*180 **4 [8] Williams correctly asserts on appeal that § 3B1.3 expressly prohibits double-counting. USSG § 3B1.3 ("[T]his adjustment *may not* be employed if an abuse of trust ... is included in the base offense level or specific offense characteristic.") (emphasis added). The court based Williams's sentence on the provisions of § 2F1.1 (fraud and deceit), and Williams received a 2-level enhancement, pursuant to § 2F1.1(b)(4), for misrepresenting that he was acting on behalf of a Government agency when he accepted money from Ewing. The court then made an 2-level upward adjustment pursuant to § 3B1.3 for abuse of a position of trust. Williams's offense, however, involved a single misrepresentation to a single person; he held no position of public or private trust with respect to Ewing other than representing himself to be a federal Marshal. Thus, the court necessarily based both the § 2F1.1(b)(4) 2-level enhancement (misrepresentation) and the § 3B1.3 upward 2-level adjustment (abuse of position of trust) on the same abuse of trust, which resulted in impermissible double-counting in the calculation of Williams's offense level.[8]

[9] Williams, however, failed to raise the issue of impermissible double-counting before the district court. Thus, our review of his contention on this point must be for plain error. *United States v. Olano*, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). We can only notice such an error if the defendant demonstrates that (1) an error occurred, (2) it was plain, and (3) it was material or affected the defendant's substantial rights. *Id.* at 732, 113 S.Ct. 1770. Even if these three conditions are satisfied, we exercise our discretion to correct plain error only when it "seriously affect [s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732, 113 S.Ct. 1770.

[10] Applying the plain error standard mandated by *Olano*, there was error in the district court's application to Williams of both the § 2F1.1(b)(4) 2-level enhancement and the § 3B1.3 2-level upward adjustment. Under *Olano*, plain error occurs when the error is "clear" or "obvious." *See United States v. Promise*, 255 F.3d 150, 160 (2001) (en banc) (citing *Olano*, 507 U.S. at 734, 113 S.Ct. 1770). We have recognized that "[a]n error is clear or obvious when the settled law of the Supreme Court or this circuit establishes that an error has occurred." *Id.* (internal quotation and citation omitted). In this case, the double-counting error is plain because: (1) we prohibit application of a Guideline provision that expressly precludes consideration of a factor previously used in applying another Guideline; (2) § 3B1.3 contains such a prohibition, by forbidding the application of the upward adjustment "if an abuse of trust ... is included in the base offense level or specific offense characteristic" of the applicable Guideline; and (3) the applicable Guideline, § 2F1.1, contains a specific offense *181 characteristic for abuse of trust, i.e., a misrepresentation that the defendant was acting on behalf of a Government agency.

**5 Turning to the third prong of *Olano*, Williams has demonstrated that the double-counting error was plain, and that it affected his substantial rights, because he was "sentenced at a more severe guideline range." *See United States v. Ford*, 88 F.3d 1350, 1356 (4th Cir.1996) (citing *United States v. Robinson*, 20 F.3d 270, 273 (7th Cir.1994) ("A sentence based on an incorrect guideline range constitutes an error affecting substantial rights and can thus constitute plain error.")); *see also United States v. Cotton*, 261 F.3d 397, 406 (4th Cir.2001); *Promise*, 255 F.3d at 150 (en banc). Finally, under

Olano, we should exercise our discretion to correct this error. As Judge Russell properly observed in our *Ford* opinion, "sentencing a defendant at the wrong guideline range seriously affects the fairness, integrity, and public reputation of the judicial proceedings." *Ford,* 88 F.3d at 1356. When Williams's sentence is properly calculated, the appropriate sentencing range is imprisonment for eighteen to twenty-four months. Williams is currently serving a term of thirty months-six months longer than his maximum permissible sentence under the Guidelines. And, as Judge Russell succinctly stated, "[n]o court of justice would require a man to serve ... undeserved years in prison when it knows that the sentence is improper." *Id.*

IV.

Accordingly, Williams's sentence must be vacated, and we remand for appropriate resentencing.

VACATED AND REMANDED.

All Citations

25 Fed.Appx. 175, 2002 WL 58160

Footnotes

1 We refer to the United States Sentencing Commission, *Guidelines Manual,* as the "Guidelines" or "USSG."

2 Section 912 of Title 18 of the United States Code provides, in pertinent part, that:

> [w]hoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any ... agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money ... shall be (punished according to law).

3 The indictment against Williams, returned on March 16, 1999, provides that:

> [b]etween May, 1997 and July, 1997, in the Eastern District of North Carolina, the defendant, MICHAEL DONALD WILLIAMS, did falsely assume and pretend to be an officer and employee of the United States acting under the authority thereof, that is a United States Marshal, and in such assumed and pretended character did obtain a thing of value, in that he obtained the sum of $700.00 in United States currency in violation of Title 18, United States Code, Section 912.

4 USSG § 2J1.4 instructs the sentencing court, in relevant part, that "[i]f the impersonation was to facilitate another offense, apply the guideline for an attempt to commit that offense, if the resulting offense level is greater than the offense level determined above."

5 USSG § 2F1.1(a), like § 2J1.4, provides for a base offense level of 6. Section 2F1.1(b), in pertinent part, instructs that:

> (2) If the offense involved (A) more than minimal planning ..., increase by 2-levels.
>
> ...
>
> (4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a ... government agency ..., increase by 2-levels.

6 USSG § **3B1.3** provides in relevant part that:

> If the defendant abused a position of public or private trust ..., in a manner that significantly facilitated the commission ... of the offense, increase by 2-levels. This adjustment may not be employed if an abuse of trust ... is included in the base offense level or specific offense characteristic.

7 USSG § 3E1.1(a) provides that "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2-levels."

8 The Government maintains that the district court did not engage in **double-counting** because the § 2F1.1(b)(4) enhancement and the § **3B1.3** upward adjustment each capture different aspects of Williams's criminal conduct. Specifically, it contends that the § 2F1.1(b)(4) enhancement pertains to "the harm that accrues when a defendant exploits a victim's trust in a government or charitable organization," while, on the other hand, the § **3B1.3** upward adjustment addresses the "harm that arises when an individual who holds (or pretends to hold) a position of trust uses that status to facilitate the commission of his crime." This distinction, however, is undermined by the specific provisions of § **3B1.3**. The application of § **3B1.3** is not based solely on the type of harm a defendant's conduct produces; instead, it is based on a "defendant abus[ing] a position of public or private trust." USSG § **3B1.3**.

End of Document

ATTACHMENT 2

United States Sentencing Commission's commentary on text of Amendments to the Sentencing Guidelines, effective November 1, 2018

Amendments to the Sentencing Guidelines

April 30, 2018

Effective Date
November 1, 2018

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary submitted to Congress, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at www.ussc.gov and will appear in a forthcoming edition of the *Federal Register*.

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The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. § 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

The Commission specified an effective date of **November 1, 2018,** for the amendments listed above and included in this compilation.

7. ALTERNATIVES TO INCARCERATION FOR NONVIOLENT FIRST OFFENDERS

Reason for Amendment: The amendment adds a new application note to the Commentary at §5C1.1 (Imposition of a Term of Imprisonment), which states that if a defendant is a "nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment." This new application note is consistent with the statutory language in 28 U.S.C. § 994(j) regarding the "general appropriateness of imposing a sentence other than imprisonment" for "a first offender who has not been convicted of a crime of violence or an otherwise serious offense" and cites the statutory provision in support. It also is consistent with a recent Commission recidivism study, which demonstrated that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system have an even lower recidivism rate. See Tracey Kyckelhahn & Trishia Cooper, U.S. Sentencing Comm'n, The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders at 6–9 (2017).

Where permitted by statute, the Guidelines Manual provides for non-incarceration sentences for offenders in Zones A and B of the Sentencing Table. Zone A (in which all sentencing ranges are zero to six months regardless of criminal history category) permits the full spectrum of sentencing options: (1) a fine only; (2) a term of probation only; (3) probation with conditions of confinement (home detention, community confinement, or intermittent confinement); (4) a "split sentence" (a term of imprisonment followed by a term of supervised release with condition of confinement that substitutes for a portion of the guideline term); or (5) a term of imprisonment only. Zone B (which includes sentencing ranges that have a low-end of one month and a high-end of 15 months, and vary by criminal history category) also authorizes non-prison sentences. However, Zone B sentencing options are more restrictive, authorizing (1) probation with conditions of confinement; (2) a "split sentence"; or (3) a term of imprisonment only. Consistent with the statutory mandate in section 994(j), the application note is intended to serve as a reminder to courts to consider imposing non-incarceration sentences for a defined class of "nonviolent first offenders" whose applicable guideline ranges are in Zones A or B of the Sentencing Table.

For purposes of the new application note, the amendment defines a "nonviolent first offender" as a defendant who (1) has no prior convictions or other comparable judicial dispositions of any kind; and (2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense. It explains that "comparable judicial dispositions of any kind" includes "diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications."

The amendment adopts language from the statutory and guidelines "safety-valve" provisions to exclude offenders who "use[d] violence or credible threats of violence or possess[ed] a firearm or other dangerous weapon in connection with the offense." See 18 U.S.C § 3553(f)(2); USSG §5C1.2(a)(2). This real-offense definition of "violent" offense avoids the complicated application of the "categorical approach" to determine whether an offense qualifies as "violent." See United States v. Starks, 861 F.3d 306, 324 (1st Cir. 2017) (describing the "immensely complicated analysis required by the categorical

approach"); see also USSG §5C1.2, comment. (n.3) (noting that the determination of whether "the offense" was violent or involved a firearm requires a court to consider not only the offense of conviction but also "all relevant conduct"). It also ensures that only nonviolent offenders are covered by the new application note.

The amendment also deletes language from the commentary to §5F1.2 (Home Detention) that generally encouraged courts to use electronic monitoring (also called location monitoring) when home detention is made a condition of supervision, and instead instructs that electronic monitoring or any alternative means of surveillance may each be used, as "appropriate." The goal of this change is to increase the use of probation with home detention as an alternative to incarceration. The Commission received testimony indicating that location monitoring is resource-intensive and otherwise demanding on probation officers. Additionally, it heard testimony that imposing location monitoring by default is inconsistent with the evidence-based "risk-needs-responsivity" (RNR) model of supervision and may be counterproductive for certain lower-risk offenders. For many low-risk offenders, less intensive surveillance methods (e.g., telephonic contact, video conference, unannounced home visits by probation officers) are sufficient to enforce home detention. The revised language would allow probation officers and courts to exercise discretion to use surveillance methods that they deem appropriate in light of evidence-based practices.

Amendment:

§5C1.1. Imposition of a Term of Imprisonment

* * *

Commentary

Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.

3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months), the court has three options:

   (A) It may impose a sentence of imprisonment.

(B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

(C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). *See* 28 U.S.C. § 994(j). For purposes of this application note, a "***nonviolent first offender***" is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase "comparable judicial dispositions of any kind" includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.

45. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (*i.e.*, the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

~~5~~6. Subsection (e) sets forth a schedule of imprisonment substitutes.

~~6~~7. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

~~7~~8. The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.

~~8~~9. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.

~~9~~10. Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

* * *

§5F1.2. Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.

Commentary

Application Notes:

1. "***Home detention***" means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance ~~and ordinarily should be used in connection with~~ for home detention. However, alternative means of surveillance may be used ~~so long as they are as effective as electronic monitoring~~if appropriate.

2. The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available.

3. The defendant's place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, *e.g.*, conditions that a monitoring system be installed, that there will be no "call forwarding" or "call waiting" services, or that there will be no cordless telephones or answering machines.

Background: The Commission has concluded that ~~the surveillance necessary for effective use of home detention ordinarily requires~~ electronic monitoring is an appropriate means of surveillance for home detention. However, in some cases home detention may effectively be enforced without electronic monitoring, *e.g.*, when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance ~~will be equally effective~~is appropriate considering the facts and circumstances of the defendant's case.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered.

* * *

§5H1.3. Mental and Emotional Conditions (Policy Statement)

* * *

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note ~~6~~7.